

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

25 Louisiana Avenue, NW
Washington, DC 20001



C. THOMAS KEEGEL
General Secretary-Treasurer

202.624.6800
www.teamster.org

September 2, 2008

Mary L. Johnson, Esquire
General Counsel
National Mediation Board
1301 K Street, N.W.
Suite 250 East
Washington, DC 20005-7011

SEP02'08 4:06:08

**Re: Comments on NMB's Proposed Changes to
Representation Manual**

Dear Ms. Johnson:

The International Brotherhood of Teamsters Airline Division ("IBT-AD") has reviewed the National Mediation Board's proposed changes to its Representation Manual and provides the following comments.

Section 2.4 – Eligibility List

The IBT-AD welcomes the Board's proposed additional requirement that carriers must provide a substantially accurate list of potential eligible voters. As we read the proposed rule, the "accuracy" requirement would preclude both over-inclusiveness and under-inclusiveness. We suggest, however, that the Board's proposed "accuracy" standard also expressly apply to the carrier's obligation to provide an address list for eligible voters. Additionally, in order to better accommodate the Board's accretion policies, we suggest that the Board's "accuracy" standard should apply to the carrier's obligation with respect to not just identifying eligible individuals in the craft or class but also to accurately identifying classifications within the class or craft.

Section 3.3 – Acceptance of Additional Authorizations/Deadline for Intervening

The Board's proposed changes to Section 3.3 apparently seek to clarify the deadline for the submission of additional authorization cards and for applications to

DAVID P. BOURNE, Director, Airline Division
25 Louisiana Avenue, NW, Washington, DC 20001 • phone (202) 624-6848 fax (202) 624-7494

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intervene. As drafted, these proposed changes are confusing. Inasmuch as the Board's Representation Manual does not actually identify intervenors and does not specify what rules apply with respect to them, we suggest that the Board add a subsection to Section 1.2 stating that "An organization or individual may intervene upon a 35% showing of interest following the submission of an application." The addition of such a subsection would enable the Board to avoid "introducing" intervenors in Section 3.3's "deadline" provisions. Instead, Section 3.3 could, as it does now, address only additional authorizations. The second (proposed) sentence could then simply add "or intervenor" after the word "applicant," and the third sentence could be deleted. In so doing, the status of intervenors would be made clear under the Manual.

Section 8.2 – Challenges and Objections

The Board's proposed changes regarding challenges and objections are very troubling and should be reworked. In this regard, we are particularly concerned that, with respect to matters involving employee eligibility and personnel matters, the Board intends to afford "substantial weight" to the records of a carrier. Such deference to an "interested" nonparty in a representation dispute is not appropriate and it is not warranted. Although active employees may have an incentive and the wherewithal to attempt to ensure the accuracy of their employer's records, the employer may or may not follow through to ensure that its records are accurate. Moreover, the carrier's records and information relating to furloughed employees are no more reliable than those that are maintained by the affected employees or other organizations that maintain personnel/employment-related records in the normal course of business. Indeed, to the extent that a presumption should be accorded to any information and records relating to employment-related matters, it should be accorded to the direct evidence provided by the affected employees themselves. At the very least, the Board should require carriers to demonstrate reasonable efforts to maintain the completeness and accuracy of the records.

Section 9.2 – Eligibility

The Board's proposed changes to Section 9.2 of the Manual require clarification. First, we do not know what the Board intends by including the undefined word "continuously" in the first sentence. Second, with respect to trainees, we are not certain whether the Board intends that its proposed eligibility rule is supposed to be applied uniformly in both the rail and airline industries. With respect to the airline industry, we suggest that the Board maintain its current rule requiring that an employee have completed training and be performing work in the craft or class under the rates of pay, rules and working conditions applicable to the craft or class.

Section 9.205 – Leaves of Absence

The Board should be awarded a high mark for proposing an eligibility standard for employee on leaves of absence, but its proposed solution is deficient. The problems

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with the Board's proposed two-prong standard (retain an employer-employee relationship and have a reasonable expectation of return to work), are that the terms are not defined, may be applied differently in union and non-union settings, and are subject to improper gamesmanship, mischief and manipulation.

First, leaves of absence granted by carriers on non-union properties are limited to statutory leaves, such as FMLA and USERRA, and "hand-book" leaves of absence granted to at-will employees. "Hand-book" leaves of absence granted to at-will employees are ripe for employer abuse. Upon learning of an organizing campaign, for example, a non-union carrier could either extend a leave of absence to an at will employee whom it perceives to be against union representation, or it could shorten the leave of absence of an at-will employee whom it perceives to be a union supporter. It is no answer to suggest that such conduct arguably violates the RLA, because (1) the time and expense of challenging the conduct in court may be prohibitive, and (2) the chilling effect of the conduct could permeate the unit regardless of the outcome of any such litigation.

Second, the Board's standard for establishing a "reasonable expectation of returning to work" is not defined. For unionized properties, the Board has taken position that if a collective bargaining agreement permits an indefinite right to recall, then employees on furlough or leave of absence remain eligible. Such an open-ended, across-the board rule does not seem appropriate, particularly when it results in grants of eligibility to septuagenarians, for example, who may have been furloughed twenty or more years ago, and all of but a handful of the positions of those individuals have been eliminated. And, such an open-ended, deferential rule is even less appropriate in a non-union setting, where the Employer reserves total discretion to set the terms of any such furlough or leave of absence.

The current state of affairs as it applies to eligibility for furloughed employees and employees on leaves of absence is a tangled mess that requires greater thought and attention than that which has been put into the change proposed to Section 9.205. We urge the Board to conduct a thorough review of the situation and to propose comprehensive eligibility rules addressing it. In the meantime, at least as stop-gap measure until the Board is able to more thoroughly address the overall situation, the Board should not presume eligibility of employees on leave of absence where such leave is not established by law or collective agreement. Leaves of absence under employer handbooks should not be recognized if they are longer than a reasonable duration of, perhaps, twelve months. Moreover, the Board should not automatically grant deference to the provisions of an Employer handbook, but should instead engage in a more searching inquiry that requires employers to demonstrate by historic practice and records that employees on leave of absence retain reemployment rights. Finally, the Board should not consider changes to recall or reemployment rights made by an employer during the laboratory period.

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Section 19.701 – Single Carrier Procedures

We believe that the Board's proposed changes to its single carrier procedures run afoul of the RLA and should be scrapped. Our concern, like that of many others, focuses in large part on the Board's proposed imposition of a standing requiring "more than a substantial majority" of union-represented employees in order to extend a union certification when there has been a merger of a non-union property with a union property.

As a threshold matter, the Board does not define the operative terms of this purported standard and, as a result, permits it to exercise unbridled discretion in single carrier cases involving non-union and union mergers and/or consolidations. Such discretion is subject to accusations of abuse, and serves only to undermine the credibility of the Board and the representation process itself.

Even if the Board were to define the operative terms, however, the standard itself would still be fatally flawed. The Board's purported standard for determining representative status relates to the actual measurement itself, not simply to the method of measurement. In so doing, the Board's purported standard seeks to impose a measurement of "more than a substantial majority," in order to extend or maintain a certification in a union/non-union merger/consolidation. Much like a rose by any other name, the Board's standard equates to a "super-majority" measurement and is still reeks of illegality. In this regard, the Board's purported super-majority standard is at odds with RLA Section 2, Ninth's requirement that a simple "majority" of employees in the craft or class support representation. As such, the Board's purported super-majority rule contravene the RLA and must be scrapped. See Railway Labor Exec. Ass'n v. NMB, 29 U.S. 655 (D.C. Cir. 1994)(nullifying the Board's original merger procedures).

Section 2, Ninth, moreover, only permits a person seeking to represent a craft or class to initiate a representation dispute. The Board, in turn, only has authority to investigate the status of a representative after a dispute has been initiated. The RLA does not allow the Board, *sua sponte*, to repudiate a certification that was previously issued. The Board's proposed single carrier procedural changes, however, would effectively allow the Board to investigate and repudiate a valid certification without a person or organization ever first having initiated a representation dispute. It would also enable carrier to repudiate the majority status of a representative. Such results are inconsistent with the RLA and its underlying policies.

Finally, any argument that that Board's purported standard does not contravene the RLA but only provides a mechanism for employees to engage in a Board-supervised representation rests purely on ideological hokum. The sad reality is that the RLA and its election procedures are stacked against union representation. The exercise of unbridled regulatory discretion not to extend a certification or even to repudiate a certification that is supported by a majority of the craft or class will even more greatly upset the delicate and finely balanced equilibrium that the RLA was intended to maintain. The Board

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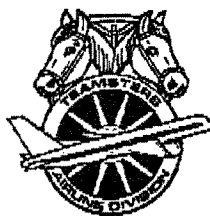
should, therefore, scrap its proposed change to Section 19.701 of the Manual. The Board should instead apply the same rules as it does when only unionized properties are involved in a merger/consolidation: where a labor organization is the certified representative of employee who constitute a majority of the combined craft or class and no party files an application for intervention to represent the combined craft or class within the permitted time period, the Board should certify the majority union.

Thank you again for the opportunity to comment on the Board's proposed changes to its Representation Manual. Please do not hesitate to contact me if you have any questions.

Respectfully,

A handwritten signature in black ink, appearing to read "David P. Bourne", with a stylized flourish at the end.

David P. Bourne, Director
Airline Division



Teamsters Airline Division

David Bourne, Director
25 Louisiana Ave., N.W. Washington, D.C. 20001

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Fax Transmission Cover Sheet

To:

National Mediation Board

Attn: Mary L. Johnson

From: Airline Division

Date: September 2, 2008

Fax No: 202-692-5085

Message:

Please find attached comments on the NMB's Proposed
Changes to the Representation Manual

Thankyou,

Robin

Please call Robin Smith at (202) 624-7497 if there is a problem with this transmission.
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